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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	7

CITATIONS

Cases:	
Bryan v. *Commissioner*, 209 F. 2d 822, certiorari denied, 348 U.S. 912	6
Comstock v. *Group of Investors*, 335 U.S. 211	5
Corn Products Co. v. *Commissioner*, 350 U.S. 46	5
Holland v. *United States*, 348 U.S. 121	6
Rogers v. *Commissioner*, 111 F. 2d 987	6
Statute:	
Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):	
Sec. 276(a)	2, 5
Sec. 293(b)	2, 4
Miscellaneous:	
Rule 34(5), Revised Rules, Supreme Court of the United States	2

626923—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 191

LEO L. LOWY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 29a–38a) [1] are not officially reported. The opinion of the court of appeals (Pet. App. 29–34) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered April 4, 1961 (Pet. App. 35). The petition for a writ of certiorari was filed on June 29, 1961. The time for filing the response on behalf of the Commissioner was

[1] Record references are to the appendix to the taxpayer's brief in the court of appeals.

extended to January 31, 1962.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether both courts below correctly concluded that part of the deficiency for 1944 was due to fraud with intent to evade tax.

STATUTE INVOLVED

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):

> SEC. 276. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION—EXCEPTIONS.
>
> (a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.
>
> * * * * *
>
> SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.
>
> * * * * *
>
> (b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).

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[1] Under Rule 34(5) of the Revised Rules, the time for filing was originally extended to September 30, 1961. By orders of Mr. Justice Harlan dated September 11, 1961, and November 14, 1961, it was subsequently extended to November 29, 1961, and January 31, 1962, respectively.

STATEMENT

For several years prior to 1944, the taxable year here involved, taxpayer had been engaged in the manufacture and sale of airplane parts. The business was conducted by the American Rolbal Corporation, of which taxpayer was the sole stockholder, president, and treasurer. All the assets of that corporation were transferred to taxpayer as of the effective date of January 1, 1944. During 1944, taxpayer carried on the business as an individual. (Pet. App. 30; R. 30a.)

In his 1944 return, taxpayer showed a loss of nearly $200,000 which the Commissioner, on audit, changed to a tax due of more than $600,000. Together with a 50 per cent fraud penalty and interest, the total tax liability for 1944 was $1,600,000. (Pet. App. 30; R. 52a.)

The evidence relevant to the charge of fraud in the filing of the 1944 return may be summarized as follows:

Taxpayer's business involved the production of large amounts of steel "scrap," *i.e.*, smaller pieces of steel ground off from larger pieces during the manufacturing process. Although this "scrap" constituted waste metal, in the sense that it could not be used by taxpayer, it nevertheless had sale value. Thus, in 1944, taxpayer sold steel "scrap" for which he received a total of $13,509.88 in checks from the vendees. The proceeds of these sales were not deposited in the business bank account. On the contrary, they were deposited, in sums ranging from $11.00 to $6,000, in six other bank accounts—four of which were joint accounts of taxpayer and his wife; one of which, the account in which the largest deposit was made, was in

the wife's name alone; and the last of which, the account in which the next largest deposit was made, was in taxpayer's name. None of these six bank accounts was reflected in the books or records of taxpayer's business. Taxpayer did maintain three accounts in the Rolbal name which were reflected in the books and records and to which taxpayer's accountant adverted in the preparation of the 1944 return. (Pet. App. 30–31; R. 32a–33a.)

Taxpayer employed two accountants, Berger and Miller, to prepare his individual returns for 1944 and 1945. Berger, who prepared the 1944 account, never saw the "scrap" accounts until after the return for that year had been filed, and Miller did not hear of the asset until after the 1944 return had been filed. (Pet. App. 31; R. 33a.)

The returns of the American Rolbal Corporation and of the taxpayer for 1942 and 1943 did not report any receipts from "scrap" sales, despite the fact that sales from that source for both years amounted to more than $19,000 (Pet. App. 31).

The Tax Court concluded that part of the deficiency for 1944 was due to fraud with intent to evade tax and that therefore the deficiency assessment for 1944 was not barred by the statute of limitations (R. 35a–37a). The court of appeals affirmed (Pet. App. 29–34).

ARGUMENT

1. The present case presents the narrow question whether taxpayer's failure to report some $13,500 of receipts from the 1944 sale of "scrap" metal constituted "fraud with intent to evade tax" (Section 293

(b) of the Internal Revenue Code of 1939, *supra*, p. 2) so as to prevent the bar of the statute of limitations from prohibiting assessment of the deficiency for that year (Section 276(a) of the 1939 Code, *supra*, p. 2). Both courts below, upon full consideration of all the facts, have agreed (R. 35a; Pet. App. 31, 33) that the 1944 return was false and fraudulent and that it was filed with intent to evade. "[I]n the absence of very exceptional showing of error," the "concurrent findings" of the two courts below must be considered final. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214; accord, *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51.

2. The record amply justifies the conclusion of both courts below that the 1944 return was fraudulent and was filed with intent to evade. Indisputably, taxpayer failed to report some $13,500 of receipts from the sale of "scrap." No part of this amount was deposited in his regular business account; nor was it reflected in his books and records. The entire amount, on the other hand, was deposited in six non-business accounts, more than two-thirds of the amount being deposited in an account of the taxpayer's wife and in a joint account which he maintained with her. The accountant who prepared the 1944 return was given no contemporaneous information about these six accounts; on the contrary, as the court below observed (Pet. App. 31), he "had never seen the 'scrap' accounts until after the return was filed; nor had * * * [the other accountant] heard of the asset until after the return for 1944 had been filed." Significantly, there was also evidence

that, in 1942 and 1943, the returns of American Rolbal Corporation and of taxpayer failed to report a total of some $19,000 of receipts from "scrap" sales. This pre-1944 pattern of omissions was correctly deemed to shed light on the question of fraud in 1944. See *Holland* v. *United States,* 348 U.S. 121; *Bryan* v. *Commissioner,* 209 F. 2d 822 (C.A. 5th), certiorari denied, 348 U.S. 912; *Rogers* v. *Commissioner,* 111 F. 2d 987 (C.A. 6th).

In arriving at their conclusion with respect to fraud, both the Tax Court and the court of appeals carefully weighed the evidence allegedly favorable to the taxpayer's position. On balance it was found (Pet. App. 31, 33) "impossible * * * to avoid the conclusion that it had been the taxpayer's habit deliberately to conceal from his taxable income some part * * * of the 'scrap' sales" and that there could be no "possible doubt that the omission of 1944, like those of 1942 and 1943, was designed to protect the petitioner from income taxes that might otherwise be levied in one form or another." In view of the evidence supporting the conclusion that the 1944 return was fraudulent and was filed with intent to evade tax, the petition presents no constitutional question for this Court's consideration (see Pet. 13–17).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
MEYER ROTHWACKS,
CAROLYN R. JUST,
Attorneys.

JANUARY 1962.